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**MEMORANDUM OF LAW**

**DATE:** February 26, 1997  
  
**NAME:** Robert W. Lawrence, Principal Accountant, Payment Services Division,  
Auditor and Comptroller  
  
**FROM:** Sharon A. Marshall, Deputy City Attorney  
  
**SUBJECT:** Federal and State Income Tax Withholding

**QUESTION PRESENTED**

May a City employee be exempted from federal income tax withholding mandated by the federal Internal Revenue Code?

**SHORT ANSWER**

No. The Internal Revenue Code (I.R.C.) does not provide exemptions under either statute cited by the employee or under any other statutes.

**BACKGROUND**

Recently a City employee sent you a number of circulars regarding persons who may be exempt from federal income tax withholding. Pursuant to the language of the circulars, he has asked you to discontinue the income tax deductions currently taken from his wages. You have asked whether the citations provided by the employee authorize you, as the payroll auditor for the City, to discontinue income tax deductions for this employee.

**ANALYSIS**

Pursuant to I.R.C. section 3402(a)(1), employers must withhold income tax from wages paid to employees. The statutory language is mandatory, not permissive. The statute further provides that an employer ask each new employee to fill out a Form W-4, "Employee Withholding Allowance Certificate," before employment begins. I.R.C. § 3402(f). If an employee fails to furnish a certificate, the employer must withhold taxes as if the employee is a single person who

has no withholding exemptions or allowances. I.R.C. § 3201(e). In the event the employer fails to withhold taxes from an employee, the employer is liable for the amount the employee should have paid. I.R.C. § 3403-1. The employer bears the burden of proving the required taxes have been paid.

The legal authority provided by the employee does not apply to his circumstances. He mistakenly relies on Treasury Publication, "Withholding Exemptions and Reductions," and 26 C.F.R. section 1.1441-5, "Claiming to be a Person not Subject to Withholding." In referring to this regulation, the employee ignores the regulation that immediately precedes it. That section, 26 C.F.R. § 1.1441-4T, specifically provides that income tax withholding is not required for personal services of nonresident alien individuals. It does not apply to an individual who is a citizen of the United States. Moreover, the position of police officer does not meet the personal services definition. The reference to California Code of Regulations, title 22, section 43329-1(c)(2) regarding "Voluntary Withholding Agreements," applies to employees who are not subject to income tax withholding, in which case the employer and employee may agree to have taxes withheld voluntarily. Since the employee is subject to tax withholding under I.R.C. § 3402(a)(1), the section cited by him regarding voluntary withholding agreements is not applicable. Finally, California Code of Regulations, title 18, section 18805-7 relates to individuals, corporations or other entities engaged in trade or business. As an employee, he is not an individual or business engaged in trade or business, thus this section is not applicable.

### CONCLUSION

The employee's reliance on the cited sections is misplaced. The Internal Revenue Code requires the City, as an employer, to withhold income taxes. Failing to do so would place the City in the untenable position of being in blatant violation of the law. We recommend that the employee seek tax advice from competent counsel, rather than selectively misapplying sections of the Internal Revenue Code. It is not necessary to respond further to communications from this employee concerning his withholding status. If he chooses, he can pursue the matter in court.

CASEY GWINN, City Attorney

By

Sharon A. Marshall  
Deputy City Attorney

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